MALAYSIAN REPORTS

ABDUL AZIZ BIN ATAN & 87 ORS. v. RENGO MALAY ESTATE SDN. BHD.

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) November 19, 1985]

[Johor Bahru – Supreme Court Civil Appeal No. 28 of 1985]

Labour Law – Employment – Sale of all the shares in Company – Whether change of employer took place – Claim by employees for termination benefits – Employment (Termination and Lay-Off Benefits) Regulations, 1980, reg. 8 – Employment Act, 1955, s. 69.

This was an appeal from the decision of the High Court reported at [1985] 2 M.L.J. 165. All the shareholders of the respondent company had sold and transferred their shares to a buyer. The main assets of the company consisted of land on which the company had carried on the business of a rubber estate and oil palm estate. Eighty-eight employees of the respondent company lodged a complaint under section 69 of the Employment Act, 1985 and claimed termination benefits under regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations, 1980. The complaint of the appellants was heard by the Assistant Director of Labour, Kluang, who dismissed their claims. The appellants' appeal to the High Court was dismissed, whereupon they appealed to the Supreme Court. The point in dispute was only whether by virtue of the sale and purchase agreement relating to the shares there was a change in the business of the estate.

Held, dismissing the appeal: regulation 8 of the Employment (Termination and Lay-off Benefits) Regulations, 1980 could not have been intended to deem termination of a contract of employment by reason only of a change in the ownership of shares of a company. Regulation 8 of the Regulations cannot be construed to deem termination of the contract of employment of the appellants where there was only a change in the ownership of the shares of the respondent company.

Cases referred to:

(1) *Kumpulan Kamuning Sdn. Bhd.* v. *Rajoo & 200 Ors.* [1983] 2 M.L.J. 400.

(2) *Associated Motor Industries (M) Sdn. Bhd.* v. *Thangaraju a/l Poomie* K.L. High Court O.M. A.44 of 1982 (unreported).

(3) *Dallow Industrial Properties Ltd.* v. *Else* [1967] 2 All E.R. 30.

(4) *Melon* v. *Hector Powe Ltd.* [1981] 1 All E.R. 313.

(5) *Cameron* v. *Hector Finlayson & Co. Ltd.* [1967] 2 I.T.R. 110.

SUPREME COURT.

B. Lobo for the appellants.
Amar Chand Vohrah for the respondents.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): We dismissed the appeal on November 19, 1985 and now give our reasons.

Rengo Malay Estate Sdn. Bhd. had an issued capital of 5,000,020 fully paid ordinary shares of $1/– each registered in the names of 25 owners. On March 10, 1981 these shares were sold to Gemas Bahru Estate Sdn. Bhd. for ringgit fifteen million and sixty only. The main assets of Rengo Malay Estate Sdn. Bhd. consisted of 1948 acres of land of rubber and oil palm estates.

On November 3, 1982 88 employees of the Rengo Malay Estate Sdn. Bhd. lodged a complaint under section 69 of the Employment Act 1955 and claimed for $168,670.40 representing the sum allegedly payable to them in April 1982. The claim was based on Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980.

Regulation 8 of the 1980 Regulations requires that when "a change occurs in the ownership" of a business or part of a business by sale or otherwise the contract of service of the employees shall be deemed to have been terminated unless –

(a) within seven days of the change of ownership the person by whom the business is taken over offers to renew the contract of service on terms and conditions not less favourable; and

(b) the employees accept the offer.

The complaint of the 88 employees in this case was heard by the Assistant Director of Labour, Kluang who dismissed their claim on May 16, 1983. The Assistant Director gave his reasons as follows:

"I am satisfied that all the 88 complainants were employees of the Rengo Malay Estate Sdn. Bhd. and that they were working for the defendant at its rubber estate before and after the sale of the defendant's shares on the same terms and conditions of service.

I am also satisfied that the shares of the Rengo Malay Estate Sdn. Bhd. did change hands, with the legal entity of the company remaining the same even after the transfer of shares took place.

Further, I am satisfied that all the complainants were still working for defendant without loss in seniority or break of service after the sale of the shares took place. The services of the complainants were never terminated."

The employees then appealed to the High Court. The High Court dismissed the appeal.

The point in dispute was only whether by virtue of the sale and purchase agreement of the shares dated March 10, 1981 there was a change in the ownership of the business of the estate.

The learned Judge distinguished *Kumpulan Kamuning Sdn. Bhd.* v. *Rajoo and 200 Others*[1] since that case dealt with the sale by the company of a part of its operations which thereby passed into new hands. It would appear that the learned Judge also disagreed with a decision of another High Court Judge in *Associated Motor Industries (M) Sdn. Bhd.* v. *Thangaraju a/l Poomie*[2]. In the latter case, the appellant limited company, engaged in the business of assembling motorcars had all its shares owned initially by Wearne Bros who subsequently sold them to Ford Motor Company. It was contended on behalf of the employees in that case that the "take-over" amounting to a change in the ownership of the business and the Judge there agreed.

The reasoning of the Judge in this case is summarised in a short paragraph appearing in his judgment at page 115 of the record.

"In the present case there was no change whatsoever in the constitution of Ladang Rengo Malay Estate Sdn. Bhd. The company did not change its identity or personality. And it continued to own all the assets of the estate which were an integral part of the business for the purposes of which the Applicants were employed."

The trial Judge did not consider that Regulation 8 of the 1980 Regulations supported the construction contended by counsel for the appellants.

The crucial words in Regulation 8 for our purpose are the words "change in the ownership of a business". "Business" is defined in Regulation 2 as follows:

"Business includes a trade, industry, profession, undertaking and any activity carried on by a person or body of persons whether corporate or incorporate".

"Business" referred to in Regulation 8 is therefore the activity or undertaking carried on by the person or body of persons.

The change that took place here was only the change in the ownership of the shares of the company. The company was not dissolved. There was no transfer of the assets or stock-in-trade of the company. Rengo Malay Estate Sdn. Bhd. was and is still legally the owner of the estate undertakings.

The phrase "change in the ownership of a business" also appears in section 13(1) of the English Redundancy Payments Act 1965. There are many cases on the eligibility for redundancy payments under the Act but we need refer only to a few. In *Dallow Industrial Properties Ltd.* v. *Else*[3] the question in the appeal was the true construction of the words "If a trade or business is transferred from one to another". However in analysing section 13(1) of the Redundancy Payments Act 1965 Lord Diplock said at page 33:

"In order to come within s.13(1) there must be a change of ownership, not merely in an asset of a business as in this case, but a change of ownership in the combination of operations carried on by the trader or by the non-trading body of persons, and there can only be a change of ownership in a business or part of a business, including business activity in the sense which I have construed it, if what is transferred is a separate and self-contained part of the operations of the transferor in which assets, stock-in-trade and the like are engaged."

In *Melon* v. *Hector Powe Ltd.*[4] the House of Lords was asked to consider the application of the words "or of a part of such a business" also appearing in section 13(1)(a) of the Redundancy Payments Act 1965. In the course of his judgment Lord Fraser of Tullybelton drew the distinction between a transfer of business and a transfer of physical assets. At page 317 he said:

"It seems to me that the essential distinction between the transfer of a business, or part of a business, and a transfer of physical assets, is that in the former case the business is transferred as a going concern, 'so that the business remains the same business but in different hands' (if I may quote from Lord Denning M.R. in *Lloyd* v. *Brassey* [1969] 1 All E.R. 382 at 384, (1969) 2 Q.B. 98 at 103 in a passage quoted by the industrial tribunal), whereas in the latter case the assets are transferred to the new owner to be used in whatever business he chooses."

Regulation 8 could not have been intended to deem termination of a contract of employment by reason only of a change in the ownership of shares of a company. Change of ownership envisaged by Regulation 8 is more than a change of ownership of shares of a company alone. Indeed shares of a company may change hands many times. In *Cameron* v. *Hector Finlayson & Co. Ltd.*[5] the share capital of the respondent company was sold and the company continued in business and the applicant remained in its employment after the sale of the shares. Apparently the applicant was transferred to work at the respondent company's new premises. It was held *inter alia* that although the share capital of the company was acquired by another firm the company

still survived and carried on business as such and there was therefore no legal change of the business and section 13 of the Redundancy Payments Act did not apply.

Under the circumstances Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 cannot in our view be construed to *deem* termination of the contract of employment of the appellants where there was only a change in the ownership of the shares of Rengo Malay Estate Sdn. Bhd.

We are of the view therefore that the conclusions of the Assistant Director and the appellate judge are correct. Appeal dismissed with costs.

Appeal dismissed.

Solicitors: *Lobo & Associates; Vohrah & Tan Chee Lan.*

PUBLIC PROSECUTOR v. ZAINUDDIN & ANOR.

[S.C. (Salleh Abas L.P., Seah & Syed Agil Barakbah S.C.JJ.) December 2 & 12, 1985]

[Kuala Lumpur – Supreme Court Criminal Reference No. 4 of 1985]

Criminal Law and Procedure – Summary trial – Whether Magistrate has power to order acquittal and discharge of accused without hearing evidence for the prosecution – Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(c) & (f) & 376 – Federal Constitution, Art. 145(3).

In this case the respondents were first charged on November 9, 1976 but the case against them had been postponed no less than twelve times since then to the date when the magistrate ordered acquittal in their favour on January 19, 1984. The learned Deputy Public Prosecutor asked for revision of the decision but the application was turned down.

The Supreme Court granted leave to have the following question of law of public interest determined:–

"In view of Article 145(3) of the Federal Constitution and section 173(c) and (f) of the Criminal Procedure Code, whether it is right for a Magistrate in a summary trial to acquit and discharge an accused person without hearing any evidence for the prosecution."

Held: in a summary trial paragraphs (c) and (f) of section 173 of the Criminal Procedure Code do not empower the court to order a discharge amounting to an acquittal of an accused person without hearing evidence of the prosecution in support of its case.

Cases referred to:

(1) *Public Prosecutor* v. *Mohamed Said* [1984] 1 M.L.J. 50.

(2) *Kuppusamy* v. *Public Prosecutor* [1948] M.L.J. 25.

(3) *Public Prosecutor* v. *Goh Kee Chuan* [1967] 1 M.L.J. 174.

(4) *Public Prosecutor* v. *Mahmud* [1974]1 M.L.J. 85.

(5) *Chu Chee Peng* v. *Public Prosecutor* [1973]2 M.L.J. 35.

SUPREME COURT.

Mohtar bin Abdullah (Deputy Public Prosecutor for the appellant.

A.K.J. D'Cruz for the respondents.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): This is a criminal reference under section 66 of the Courts of Judicature Act (Act 91) which arose from the decision of Magistrate, Seremban on January 19, 1984 ordering an acquittal and discharge of the respondents herein without hearing any evidence of the prosecution.

The learned Deputy Public Prosecutor applied to the High Court at Seremban for a revision of the decision but the application was turned down. Hence the order of the Magistrate stood.

Upon application by the learned Deputy Public Prosecutor, the Supreme Court granted him leave to have the following question of law of public interest determined:

"In view of Article 145(3) of the Federal Constitution and section 173 (c) and (f) of the Criminal Procedure Code, whether it is right in law for a Magistrate in a summary trial to acquit and discharge an accused person without hearing any evidence for the prosecution."

At our sitting on December 2, 1985 we answered the question in the negative and promised to give our written reason therefore. Hence this judgment.

The record of this case shows that the case has been postponed no less than twelve times since the respondents were first charged on November 9, 1976 to the date when the magistrate ordered acquittal in their favour on January 19, 1984, *i.e.* about eight years later. Of these twelve postponements, five were granted at the prosecution's request, two postponements because of the court's own inability to hold the trial, whilst the remaining